

SERVED: March 23, 1994

NTSB Order No. EA-4116

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of March, 1994

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-12155
v.)	
)	
HOWARD M. MACHADO,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent has appealed from a written order issued by Administrative Law Judge Jerrell R. Davis on October 5, 1992, dismissing, sua sponte, respondent's appeal from a warning letter for lack of jurisdiction, canceling the scheduled hearing, and terminating this proceeding.¹ For the reasons discussed below, we deny respondent's appeal and affirm the law judge's

¹ Attached is a copy of the law judge's order.

dismissal.²

The record in this case reveals that, in a letter dated September 3, 1991, FAA Aviation Safety Inspector James Eitel informed respondent that a records inspection of Hawaiian Airlines' Seattle facility revealed that respondent, who served as pilot-in-command of Hawaiian Air flight 21 on May 12, 1991, from Seattle to Honolulu, had not signed the dispatch release pertaining to that flight. The letter indicated that this was contrary to the Federal Aviation Regulations (FARs),³ but that it was assumed the failure was an oversight and, therefore, did not warrant legal enforcement action. Inspector Eitel's letter further stated that the letter would be made a matter of record for a period of two years, and would then be expunged.

Respondent contends that he did sign the dispatch release, and suggests that it was properly maintained at Hawaiian's Honolulu dispatch facility, rather than at its Seattle station facility. Respondent maintains that he committed no FAR violation, and is entitled to appeal the letter, which he terms a "declaratory order," to this Board. The Administrator moved to dismiss respondent's appeal for lack of jurisdiction, noting that

² Respondent's motion for leave to file an additional brief in this case is denied. The issues have been adequately addressed in the appeal and reply briefs.

³ Although the letter does not specify which regulation was violated, a copy of a portion of respondent's FAA-maintained airman record (attached to one of respondent's filings in this case) cites 14 C.F.R. 121.663 in connection with the May 12, 1991 incident. Section 121.663 requires a carrier to prepare, and a pilot-in-command to sign, a dispatch release for each flight between specified points.

section 609(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1429(a)) only provides for Board review of orders issued by the Administrator "amending, modifying, suspending, or revoking" a certificate.

Chief Administrative Law Judge Fowler denied the motion to dismiss, finding that the inspector's letter constituted a flaw on respondent's record, with potential future impact, and that his certificate had therefore effectively been modified by the letter. Judge Fowler also denied the Administrator's request for consent to an interlocutory appeal. Administrative Law Judge Davis, to whom the case was subsequently assigned, denied the Administrator's motion for reconsideration of Judge Fowler's denial of the motion to dismiss, as untimely. The Administrator thereafter filed a notice of intent not to participate in the proceeding, restating his position that the Board lacks jurisdiction over this matter. Finding that the jurisdictional issue had been fully briefed and involved a purely legal determination, Judge Davis issued his sua sponte order dismissing Respondent's appeal for lack of jurisdiction.

Judge Davis correctly concluded that the Board lacks jurisdiction in this case. In Administrator v. Sherman, NTSB Order No. EA-4019 (1993), a similar case which was decided after briefing was completed in this case, we made clear that the Board lacks jurisdiction to review a letter of warning, such as the one sent to respondent in this case. In Sherman, we indicated our disagreement with the law judge's denial of the Administrator's

motion to dismiss for lack of jurisdiction, and with his apparent finding that the warning letter could constitute an amendment or modification to an airman certificate because it represented a unilateral finding of violation which could have some adverse effect. As we explained in Sherman,

. . . administrative actions, which include letters of warning and letters of correction, are wholly distinct from legal enforcement actions. In Administrator v. Aero Lectrics, NTSB Order No. EA-3169 (1990), we found that letters of correction issued under FAR § 13.11⁴ were not orders appealable to the Board because they do not purport to take any action with regard to a certificate. See also Administrator v. Palmquist, NTSB Order No. EA-2754 at 7, n. 9 (1988). Similarly, we perceive no valid basis for concluding that a letter of warning amends or modifies an airman's certificate. To be sure, such administrative actions set forth judgments concerning the validity of certain conduct under the FAR and suggest that failure to avoid certain conduct in the future may result in enforcement action. However, the fact that an airman may, after receiving a letter of warning, feel constrained to exercise his certificate rights differently, or may

⁴ 14 C.F.R. 13.11 provides, in pertinent part:

§ 13.11 Administrative disposition of certain violations.

(a) If it is determined that a violation or an alleged violation of the Federal aviation Act of 1958, or an order or regulation issued under it, . . . does not require legal enforcement action, an appropriate official of the FAA field office responsible for processing the enforcement case or other appropriate FAA official may take administrative action in disposition of the case.

(b) An administrative action under this section does not constitute a formal adjudication of the matter, and may be taken by issuing the alleged violator --

(1) A "Warning Notice" which recites available facts and information about the incident or condition and indicates that it may have been a violation; or

(2) A "Letter of Correction" which confirms the FAA decision in the matter and states the necessary corrective action the alleged violator has taken or agrees to take. If the agreed corrective action is not fully completed legal enforcement may be taken.

strenuously object to a characterization of past conduct as contrary to law, does not mean that every disputed view of the Administrator respecting an airman's compliance with regulatory standards amounts to a certificate modification or amendment subject to our review.

Id. at 4-5 (footnotes omitted).

Even if, as respondent argues, general principles of due process require that he be given a further⁵ opportunity to be heard with regard to the charges embodied in the warning letter -- an issue we need not reach -- this Board has not been empowered by Congress to provide a forum for such an opportunity.

Section 609(a) of the Federal Aviation Act limits the Board's adjudicative authority to those cases in which the Administrator has issued an order amending, modifying, suspending, or revoking a certificate, and to certain civil penalty actions. Contrary to respondent's assertions, section 304 of the Independent Safety Board Act of 1974 (49 U.S.C. 1903) does not expand this authority.

⁵ It appears from documents appended to respondent's filings in this case that respondent was invited to provide evidence, statements, information, or explanation to Inspector Eitel regarding the incident, both before and after issuance of the September 3, 1991 letter. Respondent responded, in writing, on both occasions, but his replies apparently did not dissuade the inspector from issuing the letter or persuade him to withdraw it.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The law judge's order dismissing respondent's appeal for lack of jurisdiction is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.